Supreme Court, U.S.
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No. 92-394

In the Supreme Court of the United States

OCTOBER TERM, 1992

DANFORD WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocate General to select commissioned officers in the military to serve as court-martial trial judges.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-11a, is reported at 34 M.J. 250. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 12a-13a, is unpublished.

JURISDICTION

The judgment of the Court of Military Appeals was entered on June 5, 1992. The petition for a writ of certiorari was filed on September 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a member of the United States Marine Corps, was charged with one count of rape of his two-year-old stepdaughter, in violation of 10 U.S.C. 920. He was sentenced to confinement for ten years, a dishonorable discharge, total forfeiture of pay and allowances, and reduction to the lowest enlisted pay grade. The convening authority approved the sentence as adjudged. The Navy-Marine Corps Court of Military Review affirmed the conviction and sentence. The Court of Military Appeals granted petitioner's request for review and affirmed the judgment of the Navy-Marine Corps Court of Military Review.

ARGUMENT

Petitioner maintains that the military trial judge was not qualified to hold that position because he was appointed to it by the Judge Advocate General of the Navy, in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. That claim does not warrant review by this Court, for several reasons.

First, petitioner has not properly preserved his claim for review by this Court. Petitioner did not raise his Appointments Clause claim at or before trial and therefore has waived that claim under the rules of military procedure. See Rule for Courts-Martial 905(e), *Manual for Courts-Martial, United States—1984*, at II-109.[1]

[1] Rule 905(e) provides as follows:

> Failure by a party to raise defenses or objections or to make requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is finally adjourned for that case and,

Petitioner also did not raise that claim in the court of military review or in the Court of Military Appeals, and neither court addressed petitioner's contention. Petitioner therefore cannot raise that claim for the first time in this Court. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]") (quoting *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976)); *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987).[2]

Relying on *Freytag* v. *Commissioner*, 111 S. Ct. 2631 (1991), petitioner asks this Court to forgive his waiver. *Freytag* involved an Appointments Clause challenge to the selection of special trial judges by the chief judge of the Tax Court, a challenge that the petitioners had not raised in that court. This Court said that it had the power to excuse the petitioners' waiver, and found *Frey-*

unless otherwise provided in this Manual, failure to do so shall constitute waiver.

[2] The Court of Military Appeals did not grant review on this question. Accordingly, it is not clear that this question is subject to review by certiorari in this Court. The statutes providing for certiorari review of the judgments of the Court of Military Appeals, 28 U.S.C. 1259(3) and 10 U.S.C. 867(h)(1), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Article 67(h)(1), UCMJ, 10 U.S.C. 867(h)(1), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory right to limit its decisions in any case to less than all the issues urged by the accused. 10 U.S.C. 867(d). Since petitioner did not raise this issue for review by the Court of Military Appeals, there is a question whether that court rendered a "[d]ecision" on the issue that petitioner presents in his petition. For the reasons given in the text, however, it is unnecessary to answer that question in this case, since the question presented in the certiorari petition does not warrant review by this Court in any event.

tag to be "one of those rare cases in which we should exercise our discretion to hear petitioners' challenge" despite their failure to assert it in the courts below. 111 S. Ct. at 2639. Petitioner urges the Court to follow the same approach in this case.

Freytag, however, did not involve a rule of procedure, like Rule for Courts-Martial 905(e), requiring a defendant to raise a claim in a timely manner on pain of forfeiture. That difference is material. For the past two decades, this Court has consistently declined to review defendants' claims that have not been properly preserved under the rules of trial and appellate procedure unless the defendant can establish both "cause" and "actual prejudice" for his default. See, *e.g.*, *Davis* v. *United States*, 411 U.S. 233 (1973); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Murray* v. *Carrier*, 477 U.S. 478 (1986). Petitioner has made no effort to satisfy that test. In any event, petitioner has not explained why the question presented in this case is of such imperative public importance that this Court should deviate from its firmly settled practice of declining to serve as a nisi prius court. Finally, the Court of Military Appeals has recently granted discretionary review to resolve this question. See *United States* v. *Weiss*, No. 67869/MC (C.M.A. June 16, 1992). Once that court has spoken on the matter, there will be ample time to address the question presented by this petition.

Second, there is no conflict among the circuits on the question presented by the petition. Only two appellate courts have addressed this subject; both courts are intermediate appellate courts in the military justice system; and both courts rejected an Appointments Clause challenge to the composition of the courts of military review. See *United States* v. *Prive*, No. 984 (C.G.C.M.R. July 6, 1992); *United States* v. *Coffman*, No. 92-1030 (N.-M.C.M.R. June 3, 1992).

Third, petitioner's claim lacks merit. The question presented in this case is identical to the one presented in *Allen* v. *United States*, No. 92-273. For the reasons given in our brief in opposition in that case (a copy of which has been provided to petitioner's counsel), petitioner's challenge to the qualifications of the military trial judge in his case lacks merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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